

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1 and 17 of the)	WT Docket No. 08-61
Commission's Rules Regarding)	
Public Comment Notice Procedures)	
for Processing Antenna Structure)	
Registration Applications)	

Comments of Crown Castle USA Inc.

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Crown Castle USA Inc. ("Crown Castle")¹ submits these comments in response to the Commission's *Public Notice*, DA 08-1078 (released May 6, 2008) regarding a Petition for Expedited Rulemaking filed by CTIA et al.²

Introduction and Summary

Crown Castle owns and manages approximately 24,000 communications towers and sites in the United States that provide a platform for the antennas and equipment

¹ Crown Castle USA, Inc. is the domestic United States operating division of Houston, Texas-based Crown Castle International Corp. Subsidiaries of Crown Castle International Corp. develop, own, and manage shared infrastructure facilities such as towers and rooftops for wireless telecommunications and broadcast services in the United States and Australia.

² Petition for Expedited Rulemaking filed by CTIA-The Wireless Association, National Association of Tower Erectors, National Association of Broadcasters, and PCIA-The Wireless Infrastructure Association (May 2, 2008).

used by providers and operators of commercial wireless and public safety communications services.

On May 2, 2008, CTIA-The Wireless Association, the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA-The Wireless Infrastructure Association (collectively, the “Infrastructure Coalition”) filed their *Petition for Expedited Rulemaking* (“Petition”) in response to the decision of the Court of Appeals for the District of Columbia in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (2008) (*American Bird Conservancy* or *Remand Order*) wherein, the court affirmed in part and vacated and remanded in part the Commission’s 2006 *Memorandum Opinion and Order* relating to a petition filed by the American Bird Conservancy, the Forest Conservation Council, and the Friends of the Earth.³

The court in *American Bird Conservancy* held that the Commission failed to comply with the regulations of the Commission on Environmental Quality and its own regulations requiring public involvement in implementing National Environmental Policy Act (“NEPA”) procedures. As a result, the court remanded to the Commission, among other issues, the determination of “how it will provide notice of pending tower applications that will ensure meaningful public involvement

³ In the Matter of Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006).

in implementing NEPA procedures.”⁴ The Commission initiated this Docket to address the issues raised in *American Bird Conservancy*.

The Infrastructure Coalition’s Petition asks the Commission to amend Parts 1 and 17 of the Commission’s Rules to establish a public notice process for antenna structure registration (“ASR”) applications in response to the court’s directive. Specifically, the Infrastructure Coalition proposes that the Commission commence a rulemaking based upon two tentative conclusions: “(1) the Commission’s rules should be revised to incorporate a notice, comment and approval process for antenna structure registration applications modeled after the process for transfer and assignment applications; and (2) the Commission’s rules should be revised to clarify that any objection on environmental ground filed against an ASR application must be filed as a Petition to Deny.”⁵

Crown Castle agrees with the Infrastructure Coalition regarding the need for a rulemaking proceeding and agrees that a Petition to Deny should be filed pursuant to Commission rules and procedures. In these comments, Crown Castle suggests certain considerations additional to or, in some cases, as an alternative to the Infrastructure Coalition’s Petition.

II. The Commission Should Require Notice for only those Antenna Structures that may Significantly Affect the Environment

⁴ *American Bird Conservancy*, 516 F.3d at 1035.

⁵ In the Matter of Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications, *Petition for Expedited Rulemaking*, WT Docket No. 08-61, at 1-2, filed May 2, 2008.

The crux of the D.C. Circuit’s opinion in *American Bird Conservancy* centers on the Court’s assertion that “there is no real dispute that towers ‘may’ have significant environmental impact.”⁶ The Court focused on whether or not towers *may* have an impact rather than whether towers may have a *significant* impact. Pursuant to the National Environmental Policy Act (“NEPA”) and the Commission’s regulations, only those major federal actions that may have a significant impact on the environment require environmental assessments.⁷ As the Commission asserted in its pleadings and the Infrastructure Coalition⁸ explained in its comments to the Commission’s Notice of Proposed Rulemaking *In re Effects of Communications Towers on Migratory Birds*⁹ (“NPRM”), peer-reviewed, scientific evidence demonstrating causation between tower construction and alteration and declines in migratory avian populations does not exist.¹⁰ Indeed, according to the Commission’s own scientific expert, Avatar Environmental, L.L.C (“Avatar”), “over the last five decades of monitoring bird populations, the number of bird mortalities at towers is reported to be decreasing while the number of towers is increasing.

⁶ *Remand Order*, 516 F.3d at 1027.

⁷ 47 C.F.R. § 1.1307(a).

⁸ The Infrastructure Coalition was comprised of CTIA-The Wireless Association, the National Association of Broadcasters, the National Association of Tower Erectors, PCIA-The Wireless Infrastructure Association, the Wireless Communications Association International, Inc. and the Association for Maximum Service Television, Inc.

⁹ 21 F.C.C.R 13,241 (2006).

¹⁰ Comments of the Infrastructure Coalition, *In re Effects of Communications Towers on Migratory Birds*, WT Docket No. 03-187.

All long-term studies show a similar decline in total bird mortality....”¹¹ The Court’s misplaced focus has now resulted in a *Remand Order* requiring the FCC to provide notice of ASR applications to “ensure meaningful public notice involvement in implementing NEPA procedures.”¹² But as stated above, an environmental assessment is only necessary if the major federal action may *significantly* affect the environment and it is the responsibility of the lead agency (the Commission) to define the significance of its actions.

It is anticipated that the Commission will be the recipient of numerous Petitions to Deny as a result of the notice provisions. Notwithstanding the lack of peer-reviewed scientific evidence demonstrating a causal effect between towers and avian populations, the Commission will be forced to decide when an environmental assessment will be required. Pursuant to the Council on Environmental Quality (“CEQ”) regulations,¹³ two main points should be considered to determine significance: *context* and *intensity*. Within the realm of these parameters, the Commission is encouraged to undertake an analysis of antenna structure criteria,¹⁴ which if present, could potentially result in significant impacts to migratory birds. Given the dearth of credible research available, this may be an impossible task. But without such determination, decisions regarding whether a Petition to Deny will be granted or denied will be

¹¹ Avatar Environmental, LLC et al., Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission, at §3.2.4 (filed Dec. 10, 2004).

¹² 516 F.3d at 1027.

¹³ 40 C.F.R. § 1508.27.

¹⁴ Criteria could include tower height, lighting, the presence of guy wires and other parameters that have been discussed as potential factors relating to alleged avian issues with antenna structures.

open to legal challenge. To that end, Crown Castle believes that the Commission must undertake negotiations with the interested parties, such as the U.S. Fish and Wildlife Service, the antenna structure owners and operators and interested environmental groups, etc. to establish a nationwide programmatic agreement establishing by consensus the criteria that must be present as part of an ASR application before any environment assessment should be considered. All other ASR applications would be categorically excluded consistent with the current Commission regulations. Once agreed upon, these criteria could be utilized as a triggering mechanism for which antenna structures must be publicly noticed, as only those would be potentially subject to environmental assessments.

In addition to creating a categorical exemption for antenna structures that lack the mutually agreed upon criteria, Crown Castle agrees with the Infrastructure Coalition that certain applications and modifications to ASRs should be processed outside of the notice requirements. The Coalition suggested that such actions include, but are not limited to, administrative updates, ownership changes, notification of structure dismantlement, cancellation, withdrawal of an application and notification of completion. In addition to these actions, other administrative actions, such as corrections to data for constructed registered towers, modifications to existing antenna structures that, consistent with the Commission's Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Programmatic

Agreement”),¹⁵ do not substantially increase the height of the tower (as defined in the Collocation Programmatic Agreement) and ASRs for replacement towers where the height of the replacement tower is not a substantial increase over the height of the prior tower must also be excluded from the notice requirements. Finally, with respect to marking and lighting, determinations of the type of lighting required for a tower are based on aviation safety criteria and have historically been within the exclusive jurisdiction of the Federal Aviation Administration (“FAA”). To a limited extent, local zoning ordinances may play a factor in the type of lighting requested. In any case, the opportunity for public comment would serve no useful purpose as the final decision with respect to lighting the tower is outside the purview of both the Commission and the applicant.

III. The Commission Should Consider the Benefits of Local Notice in Lieu of National Notice via the FCC Website.

In the *Remand Order*, the Court states that “the Commission provides public notice of individual tower applications only *after* approving them.”¹⁶ It appears that the Court was not aware of the Commission’s requirement under its *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (“Programmatic Agreement”)¹⁷ that mandates applicants to

¹⁵ Codified at 40 C.F.R. §1.1307(a)(4).

¹⁶ 516 F.3d at 1027.

¹⁷ Codified at 47 C.F.R. §1.1307(a)(4).

provide written notice to the public of proposed tower construction and of modifications to towers that will result in a substantial increase in size. Such notice may be accomplished by publication in a local newspaper of general circulation. As such, no Catch-22 exists with respect to notice. Any interested party would have had notice that a new or modified tower was being planned. Indeed, notice to persons within the general locality of the proposed structure is an ideal method of notice in the present case because, in order to file a Petition to Deny, the petitioner must have standing. In order to satisfy the standing requirement, the petition must contain affidavits or letters from local individuals who reside in or visit the communities where proposed towers are to be located.¹⁸ Because antenna structure owners and builders are already providing public notice with respect to prospective towers and such program has operated successfully for many years, Crown Castle recommends that, as an alternative to FCC website notice, the Commission consider an expansion of the Programmatic Agreement notice requirement to not only historical issues but also to parties asserting that a proposed structure may significantly affect migratory birds. We believe that such notice will effectuate the goals of NEPA as more people would be provided visibility to the notice in a newspaper and the notice will be relevant to the reader. In contrast, it is unlikely that many individuals will research the FCC website on a daily basis to glean information concerning antenna structures proposed in their localities.

¹⁸ Memorandum Order and Opinion, *In re Friends of the Earth, Inc. and Forest Conservation Council, Inc.*, January 2, 2002.

IV. The Commission Must Implement Notice Provisions in a Streamlined and Efficient Manner to Effectuate the Overall Goals of Facilitating the Movement of Spectrum toward New, Higher Valued Uses

The Telecommunications Act of 1996 directs the Commission to take steps to encourage the deployment of advanced telecommunications capability by minimizing barriers to infrastructure investment.¹⁹ The Petition eloquently frames the pressing issues that will be faced in the near future as the need for infrastructure grows to facilitate the deployment of, *inter alia*, broadband services, digital television and increased safety and homeland security deployment. Any public notice plan adopted by the Commission must be streamlined and efficient to facilitate the overall Commission goals. The Infrastructure Coalition has set forth a tentative framework for Commission review and response to petitions filed in opposition to an ASR application. Crown Castle agrees that established timelines and deadlines are necessary; however, we encourage the Commission to consider shortening the time of review. As a tower owner and operator, we understand the deployment needs of our customers and strive to provide timely and efficient construction and collocation opportunities. Administrative delays of up to 81 days only to find out that an environmental assessment is needed and the submission of the environmental assessment starts the clock over are unworkable and will thwart the Commission's goals. Rather, we believe that the Commission must notify the applicant on Day 21 if an environmental assessment will be required. Under normal circumstances, it could take three to six weeks to complete an environmental assessment. The Commission can continue to review the application

¹⁹ Pub.L. No. 104-104, § 706(a), 110 Stat. 56, 153.

and any petitions that were filed while the environmental assessment is being developed. When the environmental assessment is submitted, the Commission will publish the assessment for public comment. After the 30 day public comment period, the Commission will make its final decision. In cases where an environmental assessment must be provided for reasons other than potential impacts to migratory birds (e.g., floodplains), the environmental assessment should be published in accordance with the current standards and any petitions in opposition should be required within the 30 day comment period. Decisions regarding petitions in opposition should be made after the 30 day comment period expires.

Finally, to further expedite the tower development process, Crown Castle agrees with the comments filed by APCO²⁰ recommending that the FCC allow the FAA obstruction analysis to occur simultaneously with the FCC filing. Whether structured as a “Notice of Intent to Submit” or the actual 854 submission (placed on hold until the FAA Determination is received), the ability to process the requests concurrently will help to mitigate the expected delays that will result from the notice process.

Conclusion

The Commission is in the difficult position of having to create new regulation and processes to address a perceived environmental issue without the benefit of evidence of effect or even what criteria to evaluate. For the foregoing reasons, the

²⁰ Comments of APCO, filed May 9, 2008.

FCC should commence the expedite rulemaking taking into consideration the recommendations provided herein.

Respectfully submitted,

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